DELORES JEAN DEMARRIAS MARTINEAU
v.
AREA DIRECTOR, BILLINGS AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 87-35-A Decided April 4, 1988

Appeal from a decision of the Billings Area Director, Bureau of Indian Affairs, declining to approve an allotment on the Fort Peck Indian Reservation, Montana.

Affirmed.

1. Indians: Lands: Allotments: Right to Receive

Under the Act of April 1, 1914, 38 Stat. 582, 593, the Department of the Interior had the discretion to determine whether or not to continue allotment on the Fort Peck Indian Reservation.

2. Bureau of Indian Affairs: Administrative Appeals: Acts of Agents of the United States--Federal Employees and Officers: Authority to Bind Government

Unauthorized acts by an employee of the Bureau of Indian Affairs cannot serve as the basis for conferring rights not authorized by law.

3. Constitutional Law: Due Process--Indians: Lands: Allotments: Right to Receive

Under the circumstances of this case, the requirements of due process have been met through the administrative review procedures set forth in 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

APPEARANCES: Mark A. Suagee, Esq., Benson, Arizona, for appellant; Reid Peyton Chambers, Esq., Washington, D.C., for the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

On April 24, 1987, the Board of Indian Appeals (Board) received the administrative record in this case on referral from the Deputy to the Assistant Secretary--Indian Affairs (Trust and Economic Development).

Appellant Delores Jean Demarrias Martineau seeks review of an October 14, 1986, decision issued by the Billings Area Director, Bureau of Indian Affairs (BIA; appellee), declining to approve an allotment to her on the Fort Peck Indian Reservation, Montana. For the reasons discussed below, the Board affirms that decision.

Background

Appellant, an enrolled member of the Assiniboine and Sioux Tribes of the Fort Peck Reservation (tribes), was born in 1933. On April 13, 1934, appellant's mother, Elizabeth C. Kennedy, made a selection for allotment for her infant daughter. The selection covered 320 acres, more or less, in E½ sec. 33, T. 32 N., R. 42 E., Principal Meridian, Montana, on the Fort Peck Reservation. The selection was assigned allotment number 4166, and was approved by the Superintendent of the Fort Peck Agency (Superintendent), BIA, on April 13, 1934. The selection was referred to the General Land Office in Great Falls, Montana, by letter dated April 14, 1934. By letter dated April 17, 1934, the Superintendent was informed that the allotment had been reserved for appellant. The allotment process was, however, never completed.

Pursuant to an advertised lease sale held on September 9, 1980, an oil and gas mining lease was entered into between the tribes and Exxon Corporation (Exxon). Contract No. 14-20-0256-5363, approved on June 2, 1981, covered all of sec. 33, T. 32 N., R. 42 E., Principal Meridian, in Valley County, Montana. Pursuant to a title search initiated by Exxon, appellant's potential interest in the E½ of this section was discovered. Because of possible problems with ownership of the property, Exxon entered into a supplemental agreement with appellant, dated December 28, 1981. The Superintendent was advised of this agreement and noted that fact on the agreement on January 6, 1982, without either approving or disapproving the agreement.

After learning of her possible interest in the property, appellant contacted an attorney who, following initial inquiries, formally advised BIA and the tribes of appellant's claim to the property by letter dated January 15, 1985. Appellant alleged that her reserved allotment should have been finally approved as of May 12, 1941, when other similar allotments were approved.

BIA allowed an opportunity for both appellant and the tribes to set forth their positions in written submissions. After reviewing those submissions, on March 21, 1986, the Superintendent concluded that the April 14, 1934, action approving the allotment application and requesting the General Land Office to reserve the allotment for appellant was contrary to BIA policy in effect at that time, as expressed in an April 10, 1934, letter from the Commissioner of Indian Affairs (Commissioner) to the Superintendent. Accordingly, the Superintendent held that title to the property was properly in the tribes.

Appellant filed a timely notice of appeal from this decision with appellee. By letter dated October 14, 1986, appellee upheld the Superintendent's decision. Appellee found that the April 10, 1934, letter was effective to remove the Superintendent's authority to approve allotments after that date. Appellee also found that appellant's claim was stale.

Appellant appealed this decision to the Assistant Secretary--Indian Affairs under 25 CFR Part 2. By memorandum dated April 17, 1987, the Deputy to the Assistant Secretary--Indian Affairs (Trust and Economic Development) transferred the appeal to the Board pursuant to the provisions of 25 CFR 2.19. 1/ Both appellant and the tribes have submitted briefs on appeal.

By order dated October 23, 1987, the Board requested BIA to supplement the record with copies of three letters from the Commissioner to the Superintendent. The requested letters were dated April 10, 1934; June 7, 1935; and October 28, 1935. Copies of the April 1934 and October 1935 letters were provided by appellee on November 30, 1987. Appellee stated that he had been unable to locate a copy of the June 1935 letter. The BIA Central Office in Washington, D.C., was then requested to search for the June 1935 letter. After an extensive search, which included an examination of records in the BIA Washington office and in the National Archives, BIA informed the Board that it was unable to locate a copy of the June 1935 letter. 2/

History of Allotment on the Fort Peck Reservation

Allotments on the Fort Peck Reservation were governed by two statutes: the Act of May 30, 1908, c. 237, § 2, 35 Stat. 558 (1908 Act), and the Act of April 1, 1914, c. 222, § 9, 38 Stat. 582, 593 (1914 Act). The 1908 Act initially required the Secretary of the Interior (Secretary) to survey all lands within the Fort Peck Reservation and to determine if any lands were suitable for irrigation projects or contained lignite coal. If such lands were found, they were to be reserved. The act then provided in relevant part:

> That as soon as all the lands embraced within the said Fort Peck Reservation shall have been surveyed the Commissioner of

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1/ Section 2.19 states in pertinent part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or Bureau of Indian Affairs official exercising the administrative review authority of the Commissioner] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

2/ This letter is described in Solicitor's Opinion M-30256, May 31, 1939, 57 I.D. 16, 1 Op. Sol. on Indian Affairs 902. The letter is discussed in more detail, infra.

> Indian Affairs shall cause allotments of the same to be made under the provisions of the allotment laws of the United States to all Indians belonging and having tribal rights on said reservation; * * *.

The 1914 Act states in pertinent part:

> That the Secretary of the Interior is hereby authorized to make allotments in accordance with the provisions of the Act of May thirtieth, nineteen hundred and eight * * * to children on the Fort Peck Reservation who have not received, but who are entitled to, allotments as long as any of the surplus lands within said reservation remain undisposed of, such allotments to be made under such rules and regulations as the Secretary of the Interior may prescribe.

Under instructions issued by the Secretary to the Superintendent on August 19, 1914, Fort Peck Reservation children received allotments on the reservation through 1933. In response to a February 1934 submission of 13 timber allotment selections, by letter dated April 10, 1934, the Commissioner informed the Superintendent of a change in Departmental policy concerning allotment on the Fort Peck Reservation. The letter states in pertinent part: "The present policy of the Office does not favor the further division of tribal holdings among individuals. The selections reported may be made a matter of record in your office for future reference."

The Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-479 (1982), 3/ became law on June 18, 1934. Section 461 states: "On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian." Section 478 provides that the IRA "shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." The Indians of the Fort Peck Reservation rejected application of the IRA in an election held on December 15, 1934.

As stated in Solicitor's Opinion M-30256, Continuation of Allotment Activities at Fort Peck Reservation--Rejection of IRA Implications, May 31, 1939, 57 I.D. 16, 17-18, 1 Op. Sol. on Indian Affairs 902, 903 (Opinion M-30256),

> the question arose whether allotment of the surplus lands could and should be discontinued despite the fact that section 1 of the Indian Reorganization Act [25 U.S.C. 461], prohibiting further allotment of Indian lands, did not apply to the reservation. The

3/ All further references to the United States Code are to the 1982 edition.

> determination of the Indian Office, embodied in the letter of June 7, 1935, to the Superintendent, was that further allotment activity on the Fort Peck Reservation would be contrary to the policy of the Department to preserve lands in tribal ownership, particularly as the lands of this reservation were not susceptible of effective individual use. The Superintendent was instructed to make no further allotment selections and was informed that the unapproved allotment selections would not be submitted for approval.

The Act of June 15, 1935, c. 260, § 4, 49 Stat. 378, 25 U.S.C. § 478(b) (1935 Act), amended the IRA. Section 4 of the act states in pertinent part:

> All laws, general and specific, and all treaty provisions affecting any Indian reservation which has voted or may vote to exclude itself from the application of [the IRA] shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of [the IRA].

In an opinion entitled Fort Peck Allotments, July 17,1935, 1 Op. Sol. on Indian Affairs 564, the Solicitor discussed whether the Secretary could refuse to allow further selections of allotments on the Fort Peck Reservation, and whether he could refuse to approve allotment selections already made solely on the ground of a change in Departmental policy. The Solicitor first stated that the IRA was immaterial in this instance because of the effect of the 1935 Act, under which all prior legislation relating to reservations that rejected the IRA was deemed to have been in continuous force and effect. He then examined the language of the 1914 Act and determined that, in distinction from several other allotment acts, this act merely "authorized" the Secretary to make allotments, and did not contain additional words of direction, which would have made allotment mandatory. 4/ The Solicitor concluded

> not only that the 1914 act is merely permissive, but that the discretion placed in the Secretary extends to the refusal of all further selecting of allotments whenever such refusal may reasonably be found to be more to the economic advantage of the

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4/ The Solicitor noted that the General Allotment Act, 25 U.S.C. § 331, contains a similar permissive, but not mandatory, allotment provision. Section 331 states in pertinent part:

"In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agriculture or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest * * *."

> Indians than the allotment of lands in severalty. The inquiry then becomes one of fact and policy for the Indian office to settle.

(1 Op. Sol. on Indian Affairs at 565).

In regard to the question of whether the Department could refuse to approve allotment selections already made, the Solicitor admitted that the answer was not clear. After examining potentially conflicting precedent, he concluded "that the Secretary is privileged to disapprove the Ft. Peck selections upon the grounds of policy." Id. at 566. 5/

In Opinion M-30256, supra, the Solicitor repeated that the allotment authority contained in the 1914 Act was continuing and, therefore, was still in effect after the tribes' rejection of the IRA. He then stated his opinion that

> [w]here allotment selections have been duly made under authority of the Department and pursuant to its official instructions and in accordance with a course of allotment on the reservation, * * * it is probable that a court would hold that the Secretary cannot decline to approve particular selections because of a subsequent change in land policy. * * * I base my opinion on the fact that when an official allotment selection has been duly made in accordance with the laws and regulations at the time of the selection, in ordinary circumstances the selector acquires a certain property interest in the land and a right to the perfection of his title which courts will protect.

(57 I.D. at 18, 1 Op. Sol. on Indian Affairs at 903). The Solicitor then described the kinds of property interests that the courts might recognize in such circumstances. He concluded that

> in the Fort Peck case, Congress and the Secretary of the Interior had determined 25 years ago that allotments should be made to the children as they were born, and since then individual selections have been approved or disapproved on their own merits. This legislative and administrative action may be said to have established an equitable right in the individual selector to have his selection acted upon according to the same principles. * * * In view of the protection heretofore accorded to allotment selections and the probability that the court would hold that the

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5/ Cf. Solicitor's opinion M-28086, Allotment Selections on the Fort Belknap Indian Reservation, July 17, 1935, 55 I.D. 295, 1 Op. Sol. on Indian Affairs 567. This opinion, issued the same day as the Fort Peck opinion quoted supra, stated that allotment at Fort Belknap was mandatory under the Act of Mar. 3, 1921, 41 Stat. 1355, and that allotment selections made prior to the enactment of the IRA should be completed, even though the Indians at Fort Belknap voted to accept the IRA.

> Interior Department is not privileged to refuse to complete these allotments because of a change in land policy, in my opinion the allotment selections should be completed.
>
> This decision does not dispose of the question whether the Secretary of the Interior is privileged to discontinue the further initiation of allotments on the Fort Peck Reservation. In my memorandum of September 16, 1935, [6/] * * * I indicated that the Secretary would have discretion to stop such further allotment. My reason was that the 1914 act did not contain words directing the allotment of the reservation such as were often contained in allotment acts, but merely authorized the Secretary to make allotments. In this respect the act was found to be similar to the General Allotment Act which left the determination of when the initiation of allotments should be undertaken on a reservation to the discretion of the Executive and under which the Interior Department has refrained from allotting numerous reservations. I believe my 1935 opinion was sound.

(57 I.D. at 22, Op. Sol. on Indian Affairs at 905).

Discussion and Conclusions

In declining to approve the allotment selection made for appellant, both the Superintendent and appellee cited the change in policy set forth in the Commissioner's April 10, 1934, letter. Appellee further cited the discretionary allotment authority granted to the Secretary under the 1914 Act.

There is no dispute that any right appellant may have to an allotment on the Fort Peck Reservation is governed by the 1914 Act. She argues that allotment is mandatory under that act and, therefore, BIA cannot deny her an allotment based on a change in its policy. Appellant contends that the policy of non-allotment set forth in the Commissioner's April 10, 1934, letter is that embodied in the IRA, which was not adopted on the Fort Peck Reservation. She argues that the policy of allotment, as set forth in the 1908 and 1914 Acts, remains in full force and effect on the Fort Peck Reservation, and cites the 1935 Act and the Solicitor's July 17, 1935, opinion as support for her position.

The tribes argue that allotment under the 1914 Act was discretionary, not mandatory, and the Commissioner had authority to decide to cease allotment. They contend this authority was exercised on April 10, 1934, when the Commissioner instructed the Superintendent not to continue to allot lands on the Fort Peck Reservation. Because the Superintendent's

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6/ The Board does not have a copy of the Sept. 16, 1935, memorandum from the Solicitor. The description of this memorandum, however, indicates that it presents the same analysis as that contained in the July 17, 1935, Solicitor's opinion, quoted supra.

approval of the allotment for appellant occurred after April 10, 1934, the tribes argue that the Superintendent lacked authority to approve the allotment.

The two primary Solicitor's opinions relevant to this case at times seem self-contradictory. 7/ The reason for this apparent inconsistency is that they each discuss two different issues. First, they address those allotment selections that were already initiated and partially approved before the Department announced any change in policy. Second, they discuss the authority of the Department to change its policy for the future. As to the first issue, the Solicitor ultimately concluded that those allotment selections that were initiated when the policy was to allot the reservation should be completed. However, the Solicitor further concluded that allotment under the 1914 Act was within the discretion of the Secretary, who could determine that further allotment would not be made. He believed those persons making allotment selections after the change in policy was announced could be denied allotments on the basis of the change in policy.

The initial question is, therefore, whether the Commissioner had the authority to discontinue allotment at Fort Peck. Appellant apparently contends that the Commissioner lacked authority to implement a policy consistent with any policy also set forth in the IRA on a reservation that rejected the IRA. Additionally she argues that allotment under the 1914 Act was mandatory.

[1] The Board has carefully reviewed the relevant statutes and Solicitor's opinions and hereby adopts the reasoning set forth in those opinions. It, therefore, concludes that the 1914 Act gave the Commissioner discretion to discontinue further allotment of the reservation, and that he exercised this authority in the April 10, 1934, letter. 8/ Whether the change in policy was inspired in whole or in part by the policy considerations set forth in the IRA is not relevant to the determination of the Commissioner's authority under the 1914 Act.

The second question is, then, whether the allotment selection for appellant was made when the policy was to allot the reservation or after the policy change was effective. The facts of this case show that the Commissioner announced the change in Departmental policy in a letter dated April 10, 1934. This letter was received by the Superintendent on April 13,

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7/ This problem is nowhere more apparent than in the fact that both appellant and the tribes cite the same Solicitor's opinions for diametrically opposed propositions.

8/ Appellant states that appellee has "evaded the clear logic of the Solicitor's opinion by focusing on the April 10 letter and ignoring the fact that the law at Fort Peck continued to authorize allotments on that reservation" (Opening Brief at 11). The law at Fort Peck, as interpreted here and by the Solicitor, included the Secretary's discretionary authority to determine whether or not to continue to allot the reservation.

1934. Appellant's mother made the allotment selection for appellant on April 13, 1934. The Superintendent initially approved the selection on April 13, 1934.

[2] Regardless of whether the policy was effective on April 10, when it was announced, or on April 13, when it was received, it was in effect when appellant's mother made the selection. 9/ Accordingly, the Superintendent lacked authority to consider and act on the allotment selection. The fact that the Superintendent took actions exceeding his authority does not create rights not otherwise authorized; or prevent the correction of those improper actions. See Simmons v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 243, 248 n.11 (1986), and cases cited therein; Estate of Emory Dennis Juneau, 7 IBIA 164 (1979); Administrative Appeal of Joe McComas, 5 IBIA 125, 83 I.D. 227 (1976).

Appellant further argues that her rights to due process have been violated. Appellant appears to contend that she, or her mother acting for her, had a right to advance notice of the Commissioner's intended change in policy.

[3] Appellant's argument assumes that she had a property interest which was entitled to due process protection. The Solicitor's opinions discussed above, and whose reasoning the Board has adopted, recognized that property interests arose in those allotment applicants whose applications

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9/ As noted by the tribes, the normal rule is that a law, executive pronouncement, or administrative decision is effective on the date of issuance. See e.g., United States v. Norton, 97 U.S. 164 (1878); Blanche W. Sweeney, 67 I.D. 139 (1960); George W. Bolieu, 55 I.D. 85 (1934). This general rule may have been somewhat modified in proceedings before the Department of the Interior by promulgation of 43 CFR 4.21(a), which provides that "a decision will not be effective during the time in which a person adversely affected may file a notice of appeal." See 36 FR 7186 (Apr. 15, 1971). This regulation provides for a suspension of the enforcement of the decision during the administrative appeal process in order to require persons adversely affected by decisions of Departmental officials to exhaust administrative remedies before resorting to judicial action. Even under this regulation, however, the effective date of the decision may ultimately relate back to the date of the initial decision. See, e.g., Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21, 30-31, 89 I.D. 655, 660 (1982). The Board is not aware of any comparable regulation in force in 1934.

Even assuming arguendo that this particular decision should be held to have been effective on the date of receipt, "fractions or parts of days are not considered and a decision is regarded as effective during the entire day upon which it is rendered," or here, received. Sweeney, 67 I.D. at 141. In order to negate the general rule that parts of days are not to be considered, appellant would have to present definite proof as to the time of receipt and time of her mother's selection. Bolieu, 55 I.D. at 87. Appellant has attempted no such proof.

were filed before the change in policy, but not in those applicants whose applications were filed after the change. Assuming arguendo, however, that appellant's expectation of receiving an allotment is a property interest entitled to due process protection, the Board holds that the present proceeding affords her the due process to which she is entitled under the circumstances of this case. 10/

These circumstances include the fact that neither appellant nor her mother contested the failure to complete her allotment selection for a period of 50 years, during which time property rights accrued to the tribes; i.e., tribal title to undisposed-of lands of the reservation was confirmed by statute, assuring the tribes that none of the restored lands would thereafter be subject to disposition. See Act of May 19, 1958, P.L. 85-420, 72 Stat. 121. (A temporary withdrawal of these lands approved by the Secretary on September 19, 1934, 54 I.D. 559, 563, was modified on July 25, 1952, 19 FR 7055, to allow for allotments where otherwise authorized by law. There is no comparable provision in the 1958 statute permanently restoring the lands to tribal ownership.)

Thus, although the Board does not hold, as urged by the tribes, that appellant has forfeited any right she may have had to challenge her failure to receive an allotment, it does hold that the present proceeding is adequate to vindicate whatever interests she may have. Departmental regulations in 25 CFR Part 2, and 43 CFR Part 4, Subpart D, provide appellant with a mechanism for seeking review of BIA decisions that adversely affect her. In cases involving an interpretation of law, those regulations provide a further right to review by this Board. As the Department noted when it promulgated these administrative review regulations:

> Exercise of the Secretary's review authority by the Board of Indian Appeals will insure impartial review free from organizational conflict in that the Board is a part of the Office of Hearings and Appeals in the Office of the Secretary and as such is independent of the Bureau of Indian Affairs.

40 FR 20819 (May 13, 1975). Appellant has used these administrative review procedures to challenge the BIA action. She has been represented by counsel and has fully participated in every stage of the appeal. Each decisionmaker has given her an opportunity to present her arguments. The requirements of due process have been met. See Racquet Drive Estates Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 90 I.D. 243 (1983).

10/ It has long been recognized that "interpretation and application of the Due Process Clause are intensely practical matters," calling for flexibility in the determination of what procedures are required in any particular situation. Goss v. Lopez, 419 U.S. 565, 577-78 (1975).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the October 14, 1986 decision of the Billings Area Director is affirmed.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge